IN THE HIGH COURT OF JUDICATURE AT BOMBAY:

NAGPUR BENCH:NAGPUR

CRIMINAL APPLICATION NO. 3537 OF 2005

APPLICANTS:

1] Dr.Krishnaraos/o Jagobaji Parate, aged about 70 years, occupation : Retired Service, r/o 220 Laxmi Nagar, Nagpur.

2] Baburao s/o Bhaiyyaji Thombare, aged about 75 years, occupation : Retired teacher, r/o 5, Bharat Nagar, Amravati Road,Nagpur.

3] Punjabrao s/o Daulatrao Deshmukh, aged about 69 years, occupation : Retired, r/o Ulhas Nagar, Nagpur.

VERSUS

RESPONDENTS:

1] Dadarao Lakhuji Dambhare, aged about 58 years, occ : retired Head Master, r/o 820, Ashirwad Nagar, Nagpur.

2] State of Maharashtra through Police Station Officer, Lakadganj Police Station, Nagpur.

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Mr. R.M. Parsodkar, Advocate for applicants

Mr. R.P. Joshi, Advocate for the respondent no.1

Mr. O. D. Kakde, A. P.P. for respondent no.2

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CORAM: S.R. DONGAONKAR,J.
DATE: 15/12/2006

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ORDER

Heard.

Rule.

Rule. Rule made returnable forthwith. Heard finally with consent of the parties.

1] This is an application under section 482 Criminal Procedure Code seeking quashing and setting aside the order passed by the learned Judicial Magistrate, First Class, 3rd Court, Nagpur in Criminal Complaint Case No.75/2005, an order of issuing process against the applicants for the offences punishable under section 468, 469, r/w 471 r/w 34 of Indian Penal Code.

2] Brief facts leading to this application can be stated thus - The respondent no.1 Dadarao has filed the criminal complaint case bearing no.75/2005 for the offences punishable under section 468, 469, 471 read with section 34 of Indian Penal Code, in the court of Judicial Magistrate, First Class, 3rd Court, Nagpur. During the course of the said proceedings, the learned Trial Judge, recorded the verification statement of complainant, and directed to call report of Police Station Officer, Lakadganj, Nagpur under section 202 of Criminal Procedure Code, by order dated 1.12.2002. The report was in negative. However, on 26.3.2004 the learned Magistrate, passed an order of issue of process against the present applicants. The said order reads thus:

"Order
[Date : 26.3.2004]
Perused complaint, verification, heard the counsel

for complainant.

It appears from the record that the documents pertaining to the Departmental enquiry are to be allegedly prepared as a false documents as it is not prepared as and when its purported to be made or prepared. As this documents in question are to be made in the premises of School Office and the paramount consideration for the, issuance of process is as bare reading of the complaint and the examination of complainant constitute an offence. Here in this case as per the definition of making of false document u/s 464 as who dishonestly or fraudulently made a document or part of documents. As the dishonesty is concerned as per section 24 and 25 of I.P.C. where in explanation given as "who ever does anything with intention of causing wrongful gain to one person or wrongful to loss to another person is said to do the said thing dishonestly. As such at this stage and on the basis of material before me there is prima facie sufficient ground for proceeding and hence, process be issued, u/s 204 of Criminal Procedure Code against the accused persons No.1, 2 and 3 for the alleged offence punishable u/s 468, 469, 471 read with section 34 of I.P.C.

(i) issue process against the accused persons, issue summons on payment of P.F.

(ii) Complainant is directed to supply copy of complaint and list of witnesses.

Date :26.3.206 sd/ [P.M. Nagalkar]
J.M.F.C. Court No.3, Nagpur."

It is needless to state that it was found by the learned Magistrate that there were prima facie sufficient grounds for proceeding against present applicant and therefore, process was issued under section 204 of Criminal Procedure Code. This order is challenged by applicants in the present application.

2] Learned counsel for the applicants - Shri Parsodkar has submitted that the report which was called by the learned Trial Magistrate under section 202 of Cr.P.C. was report after investigation of the offence, which was in negative and therefore, the order of issue process was incorrect. He further contended that the said process can be questioned in an application under section 482 of Criminal Procedure Code, as it would be abuse of process of law; as order of issue of process was totally unsustainable at law. In view of the judgment of this Court in 2004(4) Mh.L.J. 341 [Banwarilal Purohit and another ..vs.. Ramdeo Baba Sahakari Griha Nirman Samiti Limited, Nagpur and another] wherein relying on the observations of the Court in the case of Mohammad Atullah ..vs.. Ram Saran Mahto [AIR 1981 Supreme Court 1155, this court has held that process can not be issued on the same material that was available before directing the enquiry under section 202 of the Code of Criminal Procedure. The learned counsel for the applicants has further submitted that the matter in issue in the complaint filed by respondent no.1 concluded by the Civil Court and therefore, in such case, the complaint case is totally un-tenable and as such there was clear abuse of process of law. Further according to him, no satisfactory reasons were recorded by the learned Trial Judge while issuing process and therefore, the order impugned in this application is bad at law. It is also contended that if the proceedings are allowed to continue, holding that the material issues can be decided at the time of trial, the applicants would be put to severe difficulties and harassment because

they will have to attend the trial court's proceedings on each date and it would also affect the civil proceedings which are concluded against the respondent no.1. The respondent no.1 is found guilty in the Departmental Proceedings for misappropriation of the funds and therefore, at his instance the proceedings in complaint case, would be totally against the due process of law and causing injustice to the applicants and therefore, the impugned order is liable to be quashed and set aside, in the present application under section 482 of Criminal Procedure Code.

3] Per contra, learned counsel for respondent no.1 - Mr. R.P. Joshi submitted that the proceedings under section 482 are not maintainable. According to him, if at all the applicants were aggrieved by the order of issue of process by the learned Magistrate, they should have filed revision application in the Sessions Court. Direct approach this court is at all not warranted in the circumstances of the case. Further according to him, even if there are civil proceedings against the respondent no.1, relevant proceedings are still pending before the High Court and they are not concluded. Further according to him, proceedings in complaint case are totally different than that of civil proceedings between the parties and therefore, they are tenable if the offences are made out. He has also pointed out that the order of issue of process by the learned Magistrate is on subjective satisfaction of the Magistrate regarding grounds of proceedings and he need not even assign any reason while issuing process. Therefore, according to him, the order passed by the

learned Magistrate, impugned in this application is correct on merits and is not liable to be set aside. he has also contended that if the judgment in 2004(4) Mh.L.J. 341 [Banwarilal Purohit and another ..vs.. Ramdeo Baba Sahakari Griha Nirman Samiti Limited, Nagpur and another] of this court is relied upon, then the proper course would be to remand the matter to the learned Magistrate for consideration of matter afresh.

4] It may be stated that the learned A. P.P. for respondent no.2 has nothing specific to say.

5] The learned counsel for both the applicants and respondent no. 1 have relied on several authorities. First to contend that this application under section 482 of Criminal Procedure Code is maintainable against the order of issue of process by the Judicial Magistrate First Class, an order of issue of process need to assign reasons for issuing process, the report if any received under section 202 as per order of the learned Magistrate, has to be taken into consideration before issue of process, and lastly if civil proceedings are pending or concluded, the findings therein would be binding on the criminal court. In short, both the parties have relied on these submissions supported by some or the other authorities. I would discuss the same during the course of this order.

6] At this stage, I propose to make brief reference to the authorities cited by the learned counsel for the applicants. He has

referred to the following authorities.

1] AIR 1992 S.C. 601 [STATE OF HARYANA AND OTHERS ..VS.. CH. BHAJAN LAL AND OTHERS

2] AIR 1992 SC 1815 [PUNJAB NATIONAL BANK ..VS. SURENDRA SINHHA]

3] 1998[1]MH.L.J.798 [RAMESH NAGARE ..VS.. ASHOK NAGARE]

4] [2002]3 SCC 89 [STATE OF KARNATAKA ..VS.. M. DEVENDRAPPA

5] 2004 ALL MR [CRI] 3469 [SC] [SUBRAMANIUM SETHURAMAN ..VS.. STATE OF MAHARASHTRA]

6] 2004 ALL MR [CRI.]1802 [M/S SHRI SRINIVASA CLOTH SHOP ..VS.. STATE OF MAHARASHTRA]

7] 2004 ALL MR [CRI]3462[SC] [M/S ZANDU PHARMACEUTICALS WORKS ..VS.. MD. SHARAFUL HAQUE]

8] 2005[3] MH.L.J. 778 [V.K. JAIN ..VS.. PRATAP V. PADODE]

9] 2006 ALL MR [CRI]2444 [KUNDALIK BHOSALE ..VS.. RAMNATH BHOSALE]

10] 2006 ALL MR [CRI] 2601 [VISHVANATH R. PATIL ..VS.. ASHOK M. SONAR]

11] AIR 2004 SC 115 [SHANTIKUMAR PANDA ..VS.. SHAKUNTALA DEVI]

12] AIR 1970 SC 1381 [LALTA AND OTHERS ..VS.. STATE OF U.P.]

13] 1987[1] CRIMES 842 [S.K. SINHA ..VS.. S.K. SHINGHAL KANO]

14] 1989[2] CRIMES 1999 [KASHMIRAH SINGH ..VS.. STATE OF PUNJAB]

15] AIR 1981 SC 1155 [MOHD ATULLAH VS.. RAM SARAN MAHTO]

7] Learned counsel for the respondent no.1 has referred to the following authorities.

1] (2006)4 SCC 359 [MINU KUMARI AND ANOTHER VS. STATE OF BIHAR AND OTHERS]

2] (2001)2 SCC 17 [LALMUNI DEVI (Smt) vs. STATE OF BIHAR AND OTHERS]

3] (2006)7 SCC 188 [CENTRAL BUREAU OF INVESTIGATION VS. RAVI SHANKAR SRIVASTAVA, IAS AND ANOTHER]

4] (2004)1 SCC 525 [STATE OF MAHARASHTRA VS. SALMAN SALIM KHAN AND ANOTHER]

5] (2005)1 SCC 122 [ZANDU PHARMACEUTICL WORKS LTD. AND OTHERS VS. MOHD. SHARAFUL HAQUE AND ANOTHER]

6] (2004)4 SCC 432 [JAGDISH RAM VS. STATE OF RAJASTHAN AND ANOTHER]

7] (2003)4 SCC 139 [DY. CHIEF CONTROLLER OF IMPORTS & EXPORTS VS. ROSHANLAL AGARWAL AND OTHERS]

8] (2004) 11 SCC 622 [BHAGAT RAM VS SURINDER KUMAR AND OTHERS]

9] AIR 1989 SC 885 [M/S. INDIA CARAT PVT. LTD., VS. STATE OF KARNATAKA AND ANOTHER]

10] (2000)9 SCC 547 [MARATT RUBBER LTD. VS. J.K.MARATTUKALAMA]

11] (1998) 8 SCC 275 [C.N.RUDRAMURTHY VS. K.BARKATHULLA KHAN AND OTHERS]

12] (2002)2 SCC 420 [SUGANTHI SURESH KUMAR VS. JAGDEESHAN]

13] (2002)4 SCC 638 [DIRECTOR OF SETTLEMENTS, A.P. AND OTHERS VS. M.R.APPARAO AND ANOTHER]

14] 2006 (4) MH.L.J.771 [NATURAL SUGAR AND ALLIED INDUSTRIES LTD., AND ANOTHER VS. RAZZAK S/O HAZI GAFFAR AND OTHERS]

8] At this stage it would be desirable to find out as to whether the proceedings under section 482 of Criminal Procedure Code are maintainable against the order of issue of process. In this behalf, learned counsel for the applicant has relied on the principles laid down in AIR 1992 SC 601 [State of Haryana and others ..vs..Ch. Bhajanlal and others], wherein in paragraph 108, the following are the observations:

> “108-In the backdrop of the interpretation of the various relevant provisions of the code under chapter XIV and of the principle of law enunciated by this court in a series of decisions relating to the exercise of the extra-ordinary

power under article 226 or the inherent powers under section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise clearly defined and sufficiently chanalised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad times of cases wherein such power should be exercised.

(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials if any accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officer under section 156(1) of the Code except under an order of a Magistrate within the purview of section 155 (2) of the Code.

(3) Where the un-controverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence, but constitute only a non-cognizable offence, no investigation is permitted by a police officer, without an order of magistrate, as contemplated under section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint or so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any

> of the provision of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and / or where there is a specific provision in the code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.
> (7)Where a criminal proceeding is manifestly attended with malafide and / or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite things due to private and personal grudge."

9] He has also relied on the observations of the Apex Court in [2002]3 SCC 89 [State of Karnataka..vs.. M. Devendrappa and another], wherein in paragraph 9 the Apex Court has observed thus:

> "9. As noted above the powers possessed by the High Court under section 482 of the Code are very wide and the very plenitude of the power requires great caution in its exercise. Court must be careful to see that its decision in exercise of this power is based on sound principles. The inherent power should not be exercised to stifle a legitimate prosecution. The High Court being the Highest Court of a state should normally refrain from giving a prima facie decision in a case where the entire facts are incomplete and hazy, more so when the evidence has not been collected and produced before the court and the issues involved, whether factual or legal, are of magnitude and cannot be seen in their true perspective without sufficient material. Of course, no hard - and - fast rule can be laid down in regard to cases in which the High Court will exercise its extraordinary jurisdiction of quashing the proceedings at any stage. [See Janta Dal ..vs.. H.S. Chouhari, and Raghubir Saran (Dr.) Versus State of Bihar]. It would not be proper for the High Court to analyse the case of the complainant in the light of all probabilities in order to determine whether a convictijon would be sustainable and on

such premises arrive at a conclusion that the proceedings are tobe quashed. It would be erroneous to assess the material before it and conclude that the complaint can not be proceeded with. In a proceeding instituted on complaint exercise of the inherent powers to quash the proceedings is called for only in a case where the complaint does not disclose any offence or is frivolous, vexatious or oppressive. If the allegations set out in the complaint do not constitute the offence of which cognizance has been taken by the Magistrate, it is open to the High Court to quash the same in exercise of the inherent powers under section 482 of the Code. It is not however, necessary that there should be meticulous analysis of the case before the trial to find out whether the case would end in conviction or acquittal. The complaint has to be read as a whole. If it appears that on consideration of the allegations in the light of the statement made on oath of the complainant that the ingredients of the offence or offences are disclosed and there is no material to show that the complaint is malafide, frivolous or vexatious, in that event there would be no justification for interference by the High Court. When any information is lodged at the police station and an offence is registered, then the malafides of the informant would be of secondary importance. It is the material collected during the investigation and evidence led in the court which decides the fate of the accused person. The allegations of malafides against the informant are of no consequence and cannot by themselves be the basis for quashing the proceedings. [see - Dhanlaxmi ..vs.. R. Prasanna Kumar, State of Bihar ..vs. P.P.Sharma, Rupan Deol Bajaj ..vs.. Kanvar Palsingh Gil, State of Kerla ..vs.. O.C. Kuttan , State of U.P. ..vs.. O.P. Sharma, Rashmi Kumar ..vs. Mahesh Kumar Bhada, Satvinder Kaur ..vs.. State (Government of N.C.T. of Delhi) and Rajesh Bajaj ..vs.. State of N.C.T. of Delhi.]”

10] He has also taken me through the observations of the Apex Court in 2004 ALL MR [CRI]3469 [Subramanium Sethuraman ..vs.. State

of Maharashtra & another], particularly paragraph 17, 18 and 19 which reads thus:

> "17- As observed by us in Adalat Prasad's case the only remedy available to an aggrieved accused to challenge an order in an interolcutary stage is the extra-ordinary remedy under section 482 of the Code and not by way of an application to recall the summons or to discharge which is not contemplated in the trial of a summons case.
> 18-The learned counsel for the appellant then sought leave of this court to approach the High Court by way of 482 petition questioning the issuance of process by the Magistrate. The same was very strongly opposed by the learned counsel for the respondents who contended that the complaint in this case was filed as far back as 24th of December, 1996 and though there was a direction earlier for an early disposal of the trial, appellant and the other accused have successfully managed to keep the trial in abeyance by initiating one proceeding after another, even upto this court. He submitted that both this court as well as the High Court in the earlier proceedings has left the question of validity of statutory notice to be considered at the trial, but the accused persons including the appellant herein are time and again raising the same issue with a view to delay the trial. Hence no such permission as sought for by the appellant should be granted.
> 19- We see that this court while dismissing earlier SLP has withdrawn had left the question of legality of the notice open to be decided at the trial. Therefore, legitimately the appellant should raise this issue to decided at the trial. Be that as it may, we can not prevent an accused person from taking recourse to a remedy which is available in law. In Adalatprasad's case we have held that for an aggrieved person the only course available to challenge the issuance of process under section 204 of the Code is by way of a petition under section 482 of the Code. Hence, while we do not grant any permission to the appellant to file a petition under

> section 482 we can not also deny him the statutory right available to him, in law. However, taking into consideration the history of this case, we have no doubt the concerned court entertaining the application will also take into considerations i.e. raised by the respondent in this case as to delay i.e. being caused by the entertainment of application and petitions filed by the accused."

11] He has further taken me through the observations of this court in 2006 ALL MR (Cri) 2601 [Vishvanath Ramkrishna Patil and another .... vs. Ashok Murlidhar Sonar and another], wherein after considering the relevant authorities this court has held in paragraph 9, 10, 11 and 12 as under:

> "9. Therefore, the party who can avail remedy of revision under section 397 of Cr.P.C. can also definitely invoke the inherent power of the High Court under section 482 of Cr.P.C.
>
> The petition under article 227 of the Constitution of India is maintainable even otherwise at the instance of the aggrieved party against the order passed by the courts below.
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> 10- The Apex Court in Shail (Smt.)..vs.. Manojkumar and others, (2004)4 SCC 785 : 2004(3) Mh.L.J. 503 : (2004 ALL MR (CRI)2220 (S.C.)) has expresed in reference to the power under article 227 of the Constitution of India as under:
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> 3 - In Suryadev Rai ..vs.. Ramchandra Rai 2004(1) Mh.L.J. (S.C.)633 = (2003)6 SCC 675 this court has held that in exercise of power of Superintendence conferred under article 227 of the Constitution of India on the High Court, the High Court does have power to make such directions as the facts and circumstances of the case may warrant, may be by way of guiding the inferior court or

Tribunal as to the manner in which it would proceed hence and the High Court has the jurisdiction also to pass itself such a decision or direction as the inferior court or Tribunal should have made. The jurisdiction under Article 227 of the Constitution is to be exercised sparingly and with care and caution, but is certainly one vesting in the High Court and meant to be exercised in appropriate cases.

It is difficult to curtail this remedy merely because there is a revisional remedy available. The alternate remedy is no bar to invoke power under article 227. What is required is to see the facts and circumstances of the case while entertaining such petitions under article 227 of the Constitution and / or under section 482 of Cr.P.C. The view therefore, as taken in both cases V.K.Jain and Saket Gore , no way express total bar. If no case is made out by the petitioner or the party to invoke the inherent power as contemplated under section 482 of Cr.P.C. and / or the discretionary or the supervisory power under article 227 of the Constitution of India they may approach to the revisional court, against the order of issuance of process.

11- Taking into consideration the facts and circumstances of those cases, the learned Judge has observed in V.K. Jain and Saket Gore Supra that it would be appropriate for the parties to file revision application agaisnt the order of issuance of process. There is nothing mentioned and / or even observed that there is total bar to file petition under section 482 of Cr.P.C. and / or petition under article 227 of the Constitution of India.

12- The Apex Court's decision already referred above nowhere prohibited or expressly barred to invoke section 482 of Cr.P.C. or article 227 of the Constitution of India against the order of issuance of process."

12] As against this, the learned counsel for the respondent no.10 relied on the principles laid down by the Apex Court in 2006(4) SCC 359

[Minu Kumari and another ..vs.. State of Bihar and others], wherein the Apex Court has observed in paragraph 18, 19 and 20 as under:

> "18- Section 362 of the Code, as noted above, permits correctness of clerical or arithmetical errors. There is no quarrel with that proposition. But the High Court seems to have completely lost sight of the scope and ambit of Section 482 of the Code.
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> 19- The section does not confer any new power on the High Court. It only saves the inherent power which the court possessed before the enactment of the Code. It envisages three circumstances under which inherent jurisdiction may be exercised, namely (i) to give effect to an order under the Code, (ii)to prevent abuse of process of court and (iii) to otherwise secure the ends of justice. It is neither possible nor desirable to lay down any inflexible rule which would govern the exercise of inherent jurisdiction. No legislative enactment dealing with procedure can provide for all cases that may possible arise. Courts, therefore, have inherent powers apart from express provisions of law which are necessary for proper discharge of functions and duties imposed upon them by law. That is the doctrine which finds expression in the section which merely recognises and preserves inherent powers of the High Courts. All courts,, whether civil or criminal possess, in the absence of any express provision, as inherent in their constitution, all such powers as are necessary to do the right to undo a wrong in course of administration of justice on the principle of quando lex aliquid alicui concedit, concedere videtur id sine quo res ipsa esse non potest [when the law gives a person anything it gives him that without which it cannot exist].While exercising powers under the section, the court does not function as a court of appeal or revision. Inherent jurisdiction under the section though wide has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself. It is to be exercise ex-debito

justitiae to do real and substantial justice for the administration of which alone courts exist. Authority of the court exists for advancement of justice and if any attempt is made to abuse that authority so as to produce injustice, the court has power to prevent abuse. It would be an abuse of process of the court to allow any action which would result in injustice and prevent promotion of justice. In exercise of the powers court would be justified to quash any proceeding if it finds that initiation / continuance of it amounts to abuse of the process of court or quashing of these proceedings would otherwise serve the ends of justice.

20-As noted above the powers, possessed by the High Court under Section 482 of the Code are very wide and the very plenitude of the power requires great caution in its exercise. Court must be careful to see that its decision in exercise of this power is based on sound principles. The inherent power should not be exercised to stifle a legitimate prosecution. The High Court being the highest court of a State should normally refrain from giving a prima facie decision in a case where the entire facts are incomplete and hazy more so when the evidence has not been collected and produced before the court and the issues involved, whether factual or legal, are of magnitude and cannot be seen in their true perspective without sufficient material. Of course, no hard and fast rule can be laid down in regard to cases in which the high Court will exercise its extraordinary jurisdiction of quashing the proceeding at any stage.[See Janata Dal ..vs.. H.S. Chowdhary and Raghubar Saran(Dr.) ..vs.. State of Bihar].

13] He has further relied on 2001(2) SCC 17 [Lalmuni Devi ..vs.. State of Bihar and others], wherein the Apex Court has observed in paragraph 8 thus:

> "8-There could be no dispute to the proposition that if the complaint does not make out an offence it can be quashed. However, it is also settled law that facts may give rise to a civil claim and also amount to an offence. Merely because a civil claim is maintainable does not mean that the criminal complaint cannot be maintained. In this case, on the facts, it cannot be stated, at this prima facie stage, that this is a frivolous complaint. The High Court does not state that on facts no offence is made out. If that be so, then merely on the ground that it was a civil wrong the criminal prosecution could not have been quashed."

14] He has also taken me through the observations of the Apex Court in (2006)7 SCC 188 [Central Bureau of Investigation ..vs.. Ravi Shankar Srivastava, IAS and another], wherein in paragraph 7,9 and 10 following are the observations:

> "7- Exercise of power under Section 482 of the Code in a case of this nature is the exception and not the rule. The section does not confer any new powers on the High Court. It only saves the inherent power which the Court possessed before the enactment of the Code. It envisaged three circumstances under which the inherent jurisdiction may be exercised, namely, (i) to give effect to an order under the Code, (ii) to prevent abuse of the process of court, and (iii) to otherwise secure the ends of justice. It is neither possible nor desirable to lay down any inflexible rule which would govern the exercise of inherent jurisdiction. No legislative enactment dealing with procedure can provide for all cases that may possibly arise. The courts, therefore, have proper discharge of functions and duties imposed upon them by law. That is the doctrine which finds expression in the section which merely recognises and preserves inherent powers of the High Courts. All courts, whether civil or

criminal possess, in the absence of any express provision, as inherent in their constitution, all such powers as are necessary to do the right and to undo a wrong in the course of administration of justice on the principle "quandolex aliquid alicui concedit, concedere videtur et id sine quo res ipsae esse non potest" (when the law gives a person anything it gives him that without which it cannot exist). While exercising powers under the section, the court does not function as a court of appeal or revision. Inherent jurisdiction under the section though wide has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself. It is to be exercised ex debito justitiae to do real and substantial justice for the administration of which alone the courts exist. Authority of the court exists for advancement of justice and if any attempt is made to abuse that authority so as to produce injustice, the court has power to prevent abuse. It would be an abuse of the process of the court to allow any action which would result in injustice and prevent promotion of justice. In exercise of the powers the court would be justified to quash any proceeding if it finds that initiation/continuance of it amounts to abuse of the process of court or quashing of these proceedings would otherwise serve the ends of justice. When no offence is disclosed by the complaint, the court may examine the question of fact. When a complaint is sought to be quashed, it is permissible to look into the materials to assess what the complainant has alleged and whether any offence is made out even if the allegations are accepted in toto."

9. In dealing with the last case, it is important to bear in mind the distinction between a case where there is no legal evidence or where there is evidence which is clearly inconsistent with the accusations made, and a case where there is legal evidence which, on appreciation, may or may not support the accusations. When exercising jurisdiction

under section 482 of the Code, the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable appreciation of it accusation would not be sustained. That is the function of the trial Judge. Judicial process should not be an instrument of oppression, or , needless harassment. The Court should be circumspect and judicious in exercising discretion and should take all relevant facts and circumstances into consideration before issuing process, lest jit would be an instrument in the hands of a private complainant to unleash vendetta to harass any person needlessly. At the same time the section is not an instrument handed over to an accused to short-circuit a prosecution and bring about its sudden death. The scope of exercise of power under section 482 of the Code and the categories of cases where the High Court may exercise its power under it relating to cognizable offences to prevent abuse of process of any court or otherwise to secure the ends of justice were set out in some detail by this Court in State of Haryana ..vs.. Bhajan Lal. A note of caution was, however, added that the power should be exercised sparingly and that too in the rarest of rare cases. The illustrative categories indicated by this Court are as follows : (SCC pp.378-79, para 102).

> "102 (1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.
>
> (2) Where the allegation in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrat4 within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the Act concerned (under which a criminal proceedings is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the Act concerned, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fides and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

10. As noted above, the powers possessed by the High Court under section 482 of the Code are very wide and the very plenitude of the power requires great caution in its exercise. The Court must be careful to see that its decision

in exercise of this power is based on sound principles. The inherent power should not be exercised to stifle a legitimate prosecution. The High court being the highest court of a State should normally refrain from giving a prima facie decision in a case where the entire facts are incomplete and hazy, more so when the evidence has not been collected and produced before the Court and the issues involved, whether factual or legal, are of magnitude and cannot be seen in their true perspective without sufficient material. Of course, no hard-and-fast rule can be laid down in regard to cases in which the High Court will exercise its extraordinary jurisdiction of quashing the proceeding at any stage. [See Janata Dal V. H.S. Chowdhary and Raghubir Saran (Dr.) V State of Bihar]. It would not be proper for the High Court to analyse the case of the complainant in the light of all probabilities in order to determine whether a conviction would be sustainable and on such premises arrive at a conclusion that the proceedings are to be quashed. It would be erroneous to assess the material before it and conclude that the complaint cannot be proceeded with. In a proceeding instituted on complaint, exercise of the inherent powers to quash the proceedings is called for only in a case where the complaint does not disclose any offence or is frivolous, vexatious or oppressive. If the allegations st out in the complaint do not constitute the offence of which cognizance has been taken by the Magistrate, it is open to the High Court to quash the same in exercise of the inherent powers under Section 482 of the Code. It is not, however, necessary that there should be meticulous analysis of the case before the trial to find out whether the case would end in conviction or acquittal.; The complaint has to be read as a whole. If it appears that on consideration of the allegations in the light of the statement made on oath of the complainant that the ingredients of the offence or offences are disclosed and there is no material to show that the complaint is mala fide, frivolous or vexatious, in that event there would be no justification for interference by the High

> Court. When an information is lodged at the police station and an offence is registered, then the mala fides of the informant would be of secondary importance. it is the material collected during the investigation and evidence led in the court which decides the fate of the accused person.; The allegations of mala fides against the informant are of no consequence and cannot by themselves be the basis for quashing the proceedings. *[See Dhanalakshmi V. R.Prasanna Kumar, State of Bihar V. P.O.Sharma, Rupan Deol Bajaj V. Kanwar Pal SinghGill, State of Kerala v. O.C.Kuttan, State of U.P. V. O.P.Sharma, Rashmi Kumar V.Mahesh Kumar Bhada, Satvinder Kaur v. State (Govt. of NCT of Delhi), Rajesh Bajaj v. State NCT of Delhi and in State of Karnataka v M.Devendrappa]*

15] Apart from this, he has relied on the observations of the Apex Court in 2005(1) SCC 122 Zandu Pharmceutical Works Ltd and others ..vs.. Mohd. Sharaful Haque and another], and 2004 (4) SCC 432 [Jagdish Ram ..vs.. State of Rajasthan and another] wherein in paragraph 10 following are the observations:

> "10--In dealing with the last case, it is important to bear in mind the distinction between a case where there is no legal evidence or where there is evidence which is clearly inconsistent with the accusations made, and a case where there is legal evidence which, on appreciation, may or may not support the accusations. When exercising jurisdiction under Section 482 of the Code, the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable appreciation of it accusations would not be sustained. That is the function of the trial Judge. Judicial process should not be an instrument of oppression, or needless harassment. Court should be circumspect and judicious in exercising discretion and should take all relevant facts and circumstances into consideration before issuing process, lest it

> would be an instrument in the consideration before issuing process, lest it would be an instrument in the hands of a private complainant to unleash vendetta to harass any person needlessly. At the same time the section is not an instrument handed over to an accused to short-circuit a prosecution and being about its sudden death."

16] Learned counsel for the respondent has further relied on the principles laid down in (2004)11 SCC 622 [Bhagat Ram ..vs.. Surinder Kumar and others] and also AIR 1989 SC 885 [M/s India Carat Pvt. Ltd...vs.. State of Karnataka and another], wherein it was held that the power of the Magistrate to take cognizance is unfettered, even if there is police report to the effect that no case was made out. Apart from this as stated above, he has also relied on other authorities to contend that the law laid down by the Apex Court in the latest cases clearly overrules the view taken by this court in 2004(4) Mh.L.J. 341 [Banwarilal Purohit and another ..vs.. Ramdeo Baba Sahakari Griha Nirman Samiti Limited, Nagpur and another].

17] On perusal of the authorities referred to above it would be clear that the powers under section 482 Criminal Procedure Code are to be exercised for giving effect to an order under Code to prevent abuse of process of law and even otherwise to secure the ends of justice. No inflexible rule which would govern the exercise of the power of inherent jurisdiction can be laid down. Therefore, in extraordinary circumstances to prevent abuse of process of law, or explicitly bad order at law can be quashed and set aside by exercising powers u/s 482 of Cr.P.C.

18] As stated above, this court in the case of Vishvanath ..vs.. Ashok 2006 ALL MR [CRI] 2601, has also held that the powers under section 482 of Criminal Procedure Code can be exercised to quash the order of issue of process if it is in a way abuse of process of law. Therefore, considering totality of the circumstances and the law referred to above, I find that there would be no bar, in exercise of jurisdiction under section 482 of Criminal Procedure Code for consideration of quashing of an order of issue of process, if ex-facie the order is unsustainable at law or if it is totally illegal or perverse to the record.

19] No doubt in 2005(3) Mh.L.J. 778, this court in V.K. Jain's case has held that the remedies of challenging the order of issuing of process is to file revision before the Sessions Court, that case has been considered in the case referred to above (in Vishwanath's case) and considering the law laid down by the Apex Court and by this Court, I find that there is no absolute bar, to consider the legality of the order of issuing of process under scope of section 482 of Cr.P.C. provided the conditions therein are satisfied and regours laid by the Apex Court are complied.

20] In the present case, the learned Trial Judge has failed to take into consideration the report of the Investigating Officer which was in negative while considering case for ordering issue of process. It is necessary to refer the said report at this stage. It is pertinent to note

that, in the said report the Investigating Officer has observed that the complainant is in habit of making baseless complaints, similar complaint is pending i.e. Civil Suit No.2214/1999. Complainant has preferred this complaint to harass the applicants - accused. It is obvious from the perusal of the impugned order that the learned Trial Judge has not taken into consideration this report, but has passed an order of process.

21] Now it is necessary to consideration the observations of this court in 2004(4) Mh.L.J. 341 Banwarilal Purohit and another ..vs.. Ramdeo Baba Sahakari Griha Nirman Samiti Limited, Nagpur and another] wherein this court has observed in paragraph 9 as under:

> *"9 So, the Apex Court has very clearly held that the precedents sub-silentio and without arguments are of no moment. If we see the above cited ruling of our Division Bench, then from the observations in paragraph 5 of the said Judgment, it is very clear that the point with regard to issuance of process, without receipt of the report under section 202, once it was called, was not at all for consideration for the said Bench, as the said point was not at all pressed. So the observations of the Division Bench with regard to the effect of issuing process without waiting for the report under section 202 of Criminal Procedure Code is hit by concept of 'sub'silentio', and as such, the said ruling is of no use to the non-applicant No.1. On the contrary, the learned Advocate for the applicants has drawn my attention to a case AIR 1981 SC 1155, Mohammad Atullah ..vs.. Ram Saran Mahto. In that case, the Magistrate had called for a report under section 202 of Criminal Procedure Code from the Executive Officer of Samastipur Municipality, who of course was told the Magistrate. The Executive Officer of Samastipur Municipality submitted a cryptic report on the basis of which process was issued against three persons by the Magistrate. The Apex*

> *Court while quashing the process held that there was no additional material warranting issuance of process as report submitted under Section 202 of Criminal Procedure Code was very cryptic and not disclosing any additional material. So even in a case when the report was received, but no additional material was disclosed, it was held by the Apex Court that process cannot be issued on the same material which was available before directing inquiry under section 202 of Criminal Procedure Code. The present case is worst than that. Here the report was not received at all. Naturally, when such is the position, the Magistrate should not have proceeded further, i.e. for taking steps either under section 203 or section 204 of Criminal Procedure Code. So, taking into consideration the observations of the Apex Court in the above cited ruling, it has o be held that the order passed by the learned J.M.F.C., issuing process, though he had not received the report under section 202 of Criminal Procedure Code, as asked by him, cannot be said to be legal and proper. It is true that the applicants did not raise any objection for the issuance of process when they appeared and it is only when the case came for hearing, they raised objections for the same. However, that by itself will not make the order, legal, which was illegal or improper for the reasons mentioned above."*

and in paragraph 10 it was observed, "in view of the matter, I think that there is necessity to exercise jurisdiction under section 482 of Criminal Procedure Code and quash the order of issue of process against the applicants".

22] Learned counsel for the respondent no.1 has contended that when the report of Investigating Officer which is in negative can be ignored, learned Magistrate should be held to have ignored the said report and it should be held to have issued order of process on his

satisfaction. In fact he was not at all required to assign any reason for issuing of process in view of the above referred observations of Apex Court in Bhagatram's case and therefore, that order can not be set aside. In my opinion, even it is assumed for the moment that the learned Trial Judge was not required to assign any reason for issuing order of process, in the present case, report was called, it was on record. It was in negative, with material observations damaging to the reliability of complainant, when he was to disagree with it, it was necessary for him to record the reasons, for the obvious reasons as no order of the court can be arbitrary or capricious in nature and, it has to be based on some reasons which according to learned Judge makes him to issue such order. For showing application of mind by the court also it would be necessary. The impugned order does not refer to any of the contents of the said report. The learned counsel for the respondent has tried to contend that there are affidavits of the witnesses, who are not examined by the Investigating Officer to show that the alleged offences are committed by the applicants, as alleged by the complainant, but that fact by itself will not make the order of issuing process sustainable at law as the said affidavits have come on record after the said report of the Investigating Officer. Earlier affidavits and other material available after receipt of negative report from Investigating Officer were needed to have been considered by the trial Court vis-a-vis that report while passing the order of issue of process. Even complainant also need to get an opportunity to say as to why the report of Investigating Officer should not be accepted and the order of issue of process should be

passed, but all the same when this exercise is not done by the learned Trial Judge, the impugned order, in my opinion can not sustain.

23] It is necessary to refer the roznama, of the complaint case, after the order of calling report under section 202 of Criminal Procedure Code was passed, order reads:

Date	***Exh***	***Particulars***	***Next date***
01/11/02		Complainant is absent Arguments heard order passed on Exh.1 Call Report of 2002 Cr.P.P.to P.S. Lakadganj case fixed for A/ report	18.11.02
18.11.2002		Complainant is ... case is fixed for A/ report	18.12.2002
18.12.2002		Complainant by counsel present case is fixed for appearance	23.1.2003
23.1.2003		Complainant by counsel case fixed for A/ report	26.2.2003
26.2.2003		Complainant is absent Cased fixed for A/ r	29.4.2003
29.4.2003		Before the court's complainant present case fixed for A/ Report	09/05/03
09/05/03	4	Complainant is absent .... case fixed for	12/06/03
12/06/03		Complainant is absent case fixed for	19.7.2003
19.7.2003	5	complainant is absent Application for .... case fixed for	19.8.2003
19.8.2003		Complainant is absent case fixed for	08/09/03
08/09/03		Before the court's case fixed for.	08/10/03
08/10/03	6	Before the Court's complainant is absent u/s202 Cr.P.C. report by P.S.O. case fixed for hrg.	07/11/03
07/11/03		Before the court's complainant is presentcase fixed for Hrg.	19.11.2003
19.11.2003		Before the court' s complainant--- present case fixed for hrg	19.12.2003

Date	*Exh*	*Particulars*	*Next date*
29.12.2003	7	Before the court's complainant is present affidavit Wasule IPC case fixed for hrg.	19.1.2004
19.1.2004	8	Before the court's complainant absent accused is present affidavits case fixed for....	20.2.2004
20.2.2004		Before the court' complainant is present date changed as per direction of P.O. case fixed for Hrg.	05/03/04
05/03/04		Before the court's complainant and his counsel are present Arg heard. case adj for order	12/03/04
12/03/04		Before the court's complainant is absent for ... P.O. is busy in first half in old evi. state matter and second half P.O. is busy in .... case remand work case is fixed for order	19.3.2004
19.3.2004		Before the court's complainant is absent P.O. is busy in evidence matter and remand work case fixed for order	22.3.2004
22.3.2004	9	Before the court's complainant is absent P.O. is busy in first half in evidence matter and second half remand work Application for taking gazette on record case fixed for order	26.3.2004
26.3.2004		Before the court Complainant is absent order passed on exh. -1 Issue process against the accused case fixed for	30.4.2004

On certain dates the complainant was absent, on some dates affidavits were filed. However, all these things are not referred by the Trial Judge and therefore, I find that the order passed by the learned Magistrate is not based on consideration of material which appeared on record, after calling of report, when the report was in negative and in fact deprecating the complainant for filing frivolous civil and criminal matters

against accused. I am aware of the contention raised by the learned counsel for the applicants that the civil matter has been concluded and those are concluded against respondent no.1 and it covers the issue in complaint case also, but the fact remains that as pointed out by learned counsel for respondent the matter is still pending before the Division Bench of this court and therefore, has not become conclusive. It is needless to state the proceedings of Departmental Enquiry against the respondent no.1, from which this complaint arises, if are concluded finally, applicants would be free to raise the relevant contentions at appropriate stage.

24] This takes me to consider as to what final order needs to be passed in this application. As already pointed out above, the order impugned does not assign any reason as to why learned J.M.F.C. has disowned the report of the Investigating Officer, which was not only in negative, but was against the complainant the learned trial Judge also does not refer to the affidavits filed after the report was received, till the order of issue of process was made. In these circumstances, only order which I feel can be passed is to set aside the impugned order and remand the matter to the Trial Court for consideration of the matter afresh as if that order is not passed after hearing the complainant in this behalf.

25] As such, this application is partly allowed in the above terms. Impugned order dated 26.3.2004 of issue of process against the

applicants is hereby quashed and set aside. However, the matter is remanded back to the learned Judicial Magistrate First Class, Nagpur for consideration of the matter afresh and pass suitable orders after hearing the complainant and taking into consideration the report received by him under section 202 of Criminal Procedure Code and the affidavits filed thereafter. He would be at liberty to follow legal procedure according to law before directing issue of process if he is satisfied to that effect. Rule is made absolute in the aforesaid terms.

JUDGE

smp.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY:

NAGPUR BENCH:NAGPUR

CRIMINAL APPLICATION NO.3537 OF 2005

APPLICANTS:

1] Dr.Krishnaraos/o Jagobaji Parate, aged about 70 years, occupation : Retired Service, r/o 220 Laxmi Nagar, Nagpur.

2] Baburao s/o Bhaiyyaji Thombare, aged about 75 years, occupation : Retired teacher, r/o 5, Bharat Nagar, Amravati Road,Nagpur.

3] Punjabrao s/o Daulatrao Deshmukh, aged about 69 years, occupation : Retired, r/o Ulhas Nagar, Nagpur.

VERSUS

RESPONDENTS:

1] Dadarao Lakhuji Dambhare, aged about 58 years, occ : retired Head Master, r/o 820, Ashirwad Nagar, Nagpur.

2] State of Maharashtra through Police Station Officer, Lakadganj Police Station, Nagpur.

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Mr. R.M. Parsodkar, Advocate for applicants

Mr. R.P. Joshi, Advocate for the respondent no.1

Mr. O. D. Kakde, A. P.P. for respondent no.2

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CORAM: S.R. DONGAONKAR,J.

DATE: /12/2006

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OPERATIVE ORDER

This takes me to consider as to what final order needs to be passed in this application. As already pointed out above, the order impugned does not assign the reasons as to why he disowned the report of the Investigating Officer, which was not only in negative, but was against the complainant, he also does not refer to the affidavit filed after the report was received, till the order of issue of process was made. In these circumstances, only order which I feel need to be passed is to set aside the impugned order and remand the matter to the Trial Court for consideration of the matter afresh as if that order is not passed, hearing the complainant in this behalf.

As such, this application is partly allowed in the above terms. Impugned order dated 26.3.2004 of issue of process against the applicants is hereby quashed and set aside. However, the matter is remanded back to the learned Judicial Magistrate First Class, Nagpur for consideration of the matter afresh and pass suitable orders after hearing the complainant and taking into consideration the report received by him under section 202 of Criminal Procedure Code and the alleged affidavits filed thereafter. He is at liberty to follow legal procedure according to law before directing issue of process if he is satisfied to that effect. Rule is made absolute in the aforesaid terms.

JUDGE

smp